IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NO. 62 OF 2001.

Shri Sanjay Maulingkar,
r/o Naikawaddo, Aldona.
Presently Central Jail,
Aguada. ... Appellant.

Versus

State through Public
Prosecutor, Panaji. ... Respondent.

Mr. Arun Bras De Sa, Advocate for the Appellant.

Mr. S.N. Sardessai, Public Prosecutor for the Respondent/State.

Coram : P.V. HARDAS, J.

Date : 25th July 2003.

ORAL JUDGMENT.

The appellant/accused, who is convicted for an offence punishable under Section 376(2)(f) of the Indian Penal Code and is sentenced to rigorous imprisonment for 10 years and fine of Rs. 5,000/-, in default simple imprisonment for two months, by the IInd Additional Sessions Judge, Panaji, by Judgment, dated 16th July 2001, in Sessions Case No. 1 of 2000, has filed the present appeal challenging his conviction and sentence.

2. The facts as are necessary for the decision of the appeal are set out hereunder:-

P.W.14 P.I. Chandrakant Salgaonkar was attached to the Mapusa Police Station. On 13th December 1998, he registered an offence on the basis of the

complaint, Exhibit 17, filed by P.W.5 Arti Pednekar, Vide Crime No. 313/98 under Section 376 of the Indian Penal Code. He then drew the scene of offence panchanama at Exhibit 14 in the presence of P.W.2 Madhukar Gauns and P.W.3 Roberto Coelho. Vide Exhibit 12, the clothes of the victim P.W.9 Avisha Pednekar came to be attached as well as Exhibit 13 a certificate issued by P.W.4 Dr. Vasudeo Ghodekar. The victim P.W.9 Avisha was referred for medical examination to the Goa Medical College. The accused, who was arrested on 13th December 1998 was also referred for medical examination. P.W.7 Dr. E.J. Rodrigues examined P.W.9 Avisha and the certificate of examination is at Exhibit 21. He found that there was a bruise with swelling with tenderness of 2 x 2 cms. over back part of right heel purplish in colour. There was also a bruise reddish in colour with tenderness at 3 o'clock position of hymenal opening. He did not notice any apparent hymenal tear. On his examination he opined that there was evidence of recent vulval penetration. The victim girl was also referred for blood grouping to the blood bank by the requisition at Exhibit 22. The slide and the vaginal smear were referred to the Police for chemical analysis. P.W.6 Dr. J.D. Lawande found the blood group of P.W.9 Avisha as B Rh Positive and the blood group of the accused as A Rh Positive. P.W.7 Dr. Rodrigues had also examined the appellant/accused and observed a linear superficial

laceration of 5 m.m. reddish, tender to touch with no bleeding present at the frenum of posterior part of glans of penis. He, therefore, opined that the injury was suggestive of attempted penetration. The medical certificate of the appellant is at Exhibit 26. The muddemal articles were referred to the Central Forensic Science Laboratory and the report at Exhibit 30 Colly is proved by P.W.8 Suresh Babu. As per the report, P.W.8 Suresh detected blood on the frock and knicker of P.W.9 Avisha. The vaginal slide and smear did not show the presence of semen. The appellant/accused while in custody is alleged to have made a statement that he would show the place where he had kept the clothes worn by him. Accordingly, a recovery panchanama, at Exhibit 8, was drawn in the presence of P.W.1 Jagannath Udipi. In pursuance to the disclosure statement, the clothes came to be attached and the clothes are M.Os. 3 to 5. The investigation was, thereafter, handed over to P.W.13 Dy.S.P. Vishnu Parab. He had then handed over the investigation to P.W.15 P.I. Allan D'Sa. After completion of the investigation, a charge-sheet against the appellant/accused came to be filed.

3. The learned IInd Additional Sessions Judge, Panaji, vide Exhibit 4, framed a charge against the appellant/accused for an offence punishable under Section 376 of the Indian Penal Code. The

appellant/accused denied his guilt and claimed to be tried. The prosecution in support of its case examined 15 witnesses. The appellant/accused in his defence examined 2 witnesses. The defence of the appellant/accused is that, at the relevant time, he was working as a labourer engaged by D.W.1 Tulshidas Sawant.

4. P.W.5 Arti, mother of P.W.9 Avisha, states that her daughter P.W.9 Avisha was 7 years old at the time of the incident. She has a son named Yeshwant, who is aged 3 years. On 9th December 1998, her husband bad bathed her children and, at about 7.30 p.m., her neighbour Bhage, that is, mother of the present appellant/accused, came to her house and took both the children to her house. She had gone to the house of the appellant/accused, at about 7.45 p.m., for returning certain articles borrowed by her. While returning to her house, she saw her daughter standing in the courtyard of the house of the accused. She asked her daughter to come home and both of them came home walking. On the way, when they reached near an electric pole, she noticed blood on her daughter's leg. On being asked the reason for the bleeding, P.W.9 Avisha did not reply anything. She, therefore, took Avisha inside the house and examined her. She noticed blood on Avisha's thigh and on the knicker. On removing the knicker, she noticed a slight trickle of blood from her vagina. She,

therefore, asked Avisha what had happened? Thereupon, P.W.9 Avisha informed her that the accused had removed her knicker, removed his pant, kissed her and, thereafter, he stood behind her and put his penis in her vagina. This was done by the accused in a lane behind his house. On hearing this, P.W.5 Arti went to the house of the accused and asked where the accused was. The mother of the accused informed P.W.5 Arti that she did not know where the accused was. P.W.5 Arti then narrated the entire incident to the mother and sister-in-law of the accused. The brother of the accused by name Vishwas went to bring the accused. Vishwas came to the house of Arti alongwith the accused and asked the accused in the presence of Arti about the incident, which the accused denied. P.W.5 Arti, thereafter, took her daughter to P.W.4 Dr. Ghodekar. On examining P.W.9 Avisha, P.W.4 Dr. Ghodekar informed P.W.5 Arti that it was a case of rape and told them to report the matter to the police. He, accordingly, issued a certificate at Exhibit 13. P.W.5 Arti then took her daughter to other hospitals but, none of them admitted P.W.9 Avisha, as it was a medico-legal case. P.W.5 Arti and P.W.10 Anand Pednekar, therefore, returned home. Meanwhile some one had informed the landlady of Arti. In a meeting, which was organized, the accused was asked about the incident, which was denied by the accused. Thereafter, some one suggested

that a coconut be brought and the accused be asked to swear by touching the coconut. However, before the coconut could be brought, the accused admitted the allegations levelled against him. Then it was decided to lodge a complaint and, accordingly, the complaint at Exhibit 17 came to be lodged.

5. In the cross-examination she has admitted that P.W.3 Roberto, son of the landlady, had accompanied her to the police station. She has also admitted that she would not have lodged a complaint if she was not told by the villagers, the landlady and the landlady's son to do so. She has also admitted that the landlady and her son P.W.3 Roberto had asked her to carry the clothes worn by P.W.9 Avisha. A contradiction was brought out in her cross-examination at A to A1 that she wanted to report about the matter to the landlady. A contradiction to the effect that the complaint was read over to her was also proved. She states that the accused was also in the car of the landlady when they had gone to the police station as well as to the Goa Medical College. She has stated that the doctor directly examined P.W.9 Avisha and did not inquire anything from them. She has also admitted that there was no talk between her and Dr. Rodrigues. She has, however, admitted that Dr. Rodrigues had questioned the landlady Maria. She denied the suggestion that the relations between the landlady

Maria and the family of the accused are strained. She has also denied the suggestion that at the instance of Maria, she has lodged a false report. She also denied the suggestion that because P.W.3 Roberto had slapped the accused, the accused admitted his guilt. She has also admitted that the people from the locality forced her and her husband to file the complaint. In the cross-examination she has further admitted that P.W.9 Avisha had told her that the accused had banged her foot on the skirting of the wall of the compound and that is how Avisha was having pain in her heel. She has, however, admitted that she did not tell the police about the pain in the heel.

6. P.W.10 Anand, husband of P.W.5 Arti and father of P.W.9 Avisha, corroborates the version of P.W.5 Arti. In the cross-examination he denied the suggestion that the relation between his landlady and the family of the accused was strained. He has admitted that he did not ask P.W.9 Avisha as to how long the incident of rape lasted. He has also admitted that he did not hear any shout for help of Avisha. He has denied that P.W.9 Avisha did not inform him about the incident.

7. P.W.9 Avisha, who, at the time of recording her evidence, was 9 years old, stated that on the date of the incident, the mother of the accused had come to

her house and had taken her and her brother to her house. Thereafter, her paternal uncle Hanumant had come and taken her younger brother home. After some time, while she was returning to her house, the accused called her in the lane, which is situated behind the house of the accused. After taking her to the lane, the accused removed her frock and her knicker. The accused, who was wearing half pant, removed his half pant and 'inserted his private part in her private part in a standing position with both facing each other'. She states that she experienced pain and bleeding. Thereafter, the accused asked her to wear her clothes and go home. While going home she met her mother. She, thereafter, states about her mother noticing blood on her leg and asking her about the cause. She also states that she informed her mother about what the accused had done. She then states about her parents taking her to Dr. Ghodekar and about Dr. Ghodekar examining her. She also states that her parents had taken her to other hospitals. She then states that after two days she was taken to the police station and sent for medical examination. In the cross-examination she states that she does not recall if she had made any statement to the police. She has admitted that her frock and panty were stained with blood. She denied the suggestion that the mother of the accused had not taken her and her brother to watch T.V.. She also denied the suggestion that the

relations between her parents and the family of the accused were strained. She has added that the relations are strained after the incident. She has also admitted that, when she had left the house of the accused, his two brothers were watching T.V.. She has denied the suggestion that she was told by her parents not to go to the house of the accused to watch T.V.. She has admitted that she had sustained injury to her foot in the evening of the day of the incident. In answer to the Court question she has stated that the accused caught hold of her from the front and her foot banged on the stone causing her the said injury. She denied the suggestion that she had sustained the injury on account of falling astride. She has admitted that in the lane there are houses of people. She has also admitted that, initially, when her mother had asked her the cause for bleeding near the electric pole, she had kept quiet. She has also admitted that initially the accused had denied his guilt. She has also admitted that the doctor did not write any prescription for medicine nor did he give anything in writing. She has admitted that when she was examined in the Goa Medical College, there was no talk between her and the doctor.

8. P.W.11 Vincent Mendonsa and P.W.12 Eknath Kandolkar are the neighbours, who confirm about the accused admitting his guilt when someone suggested to

make the accused to swear by touching the coconut.

9. Mr. D'Sa, the learned counsel appointed from the Legal Aid Panel for the appellant, who has very ably argued the appeal, has urged before me (1) the conduct of P.W.5 Arti and P.W.10 Anand in not immediately reporting the matter to the police casts a suspicion on the genuineness and the truthfulness of the allegations levelled against the accused; (2) he has further urged that P.W.7 Dr. Rodrigues has admitted that penetration with the accused and Avisha facing each other was not possible; (3) he has also urged that there was no bleeding injury on Avisha and, therefore, the version of P.W.5 Arti and P.W.10 Anand is completely falsified; (4) he has also urged that P.W.9 Avisha has admitted that P.W.4 Dr. Ghodekar had not given anything in writing and thus falsified P.W.4 Dr. Ghodekar and (5) he has urged that the accused had examined defence witnesses and has proved his alibi.

He, therefore, claims that the incident as narrated by the prosecutrix tasks human credulity for its acceptance and, therefore, the accused is entitled to be acquitted.

10. Mr. Sardessai, the learned Public Prosecutor, has defended the Judgment of the learned trial Court and

has submitted that the prosecution has explained the delay in lodging the complaint. According to him, there is no reason to disbelieve P.W.5 Arti, P.W.10 Anand and P.W.9 Avisha. The circumstantial evidence corroborates the statement of P.W.9 Avisha. According to the learned Public Prosecutor, the evidence of alibi is an afterthought and, since the accused was working at a distance of just 1 km. from his house, it was possible for him to have committed the act and returned to work.

He, therefore, submits that the appeal be dismissed maintaining the conviction and sentence.

11. It is true that there was delay in filing the complaint to the police. The alleged incident of rape is said to have occurred on 9th and a report complaining about the same came to be filed on 13th December 1998. Delay simpliciter would not as a matter of rule cast a suspicion nor can it be used as a foundation for imputing false implication of an accused. The Court has to examine the aspect of delay on its own merits. Unexplained delay in a given case may lead the Court to draw an inference that the accused has been falsely implicated particularly if there is proved animosity between the complainant and the accused. Similarly also when an explanation for delay is tendered by the prosecution, the Court has to examine the explanation on

the touch stone of probability to determine whether the reason for the delay appeared to be probable. In the present case P.W.5 Arti has stated that the reputation of Avisha and her family were at stake and, therefore, a report was not immediately lodged. They had repeatedly asked the accused whether he had committed the offence and it was only when the accused admitted his guilt and after the villagers told them to lodge a complaint that a complaint in this behalf came to be lodged in the police station. The reticence on the part of P.W.5 Arti and P.W.10 Anand in not reporting the matter to the police immediately is understandable. No parent would want an allegation of this nature, particularly when the victim is about 7 to 8 years old, to be publicised for everyone to read and to jeer and make fun of. Gathering information from a child about an incident of this nature is a traumatic experience for the parents as also for the victim herself. An incident of this nature undeniably leaves scars on the memory, which remain indelible for the rest of the life. The conduct of P.W.5 Arti and P.W.10 Anand, therefore, cannot be viewed at with suspicion because they had not immediately lodged a complaint. In fact, they were not willing to lodge the complaint, but, for the persuasion of the neighbours. The act of calling a meeting and questioning the accused in the presence of the villagers, cannot be considered as an act of publicity,

which the parents intended to avoid by lodging the complaint. It is normal human reaction on learning of the incident, to satisfy themselves regarding the truthfulness of the allegations. Their conduct, therefore, according to me, cannot be viewed with any suspicion. According to me, the delay in lodging the complaint has been satisfactorily explained and it cannot be presumed that because of the delay an inference can legitimately be drawn that the accused has been falsely inveigled in the crime.

12. No doubt the prosecutrix had stated that the accused had attempted penetration while Avisha and the accused were facing each other. It is no doubt true that P.W.7 Dr. Rodrigues has stated that normally intercourse in a standing position is difficult. He has further admitted that it is very difficult to have sexual intercourse with a girl of infantile growth in standing position. He has also admitted that vulval penetration is possible to a minor girl in a standing position posteriorly. In the further cross-examination, however, he has denied the suggestion that in case of vulval penetration posteriorly in standing position in a minor girl shorter in height than the male the vaginal injury should be at 6 o'clock position. He has further added that the 'bruise found on the victim girl with tenderness at 3 o'clock position could be caused in the

course of vulval penetration frontally more than posteriorly'. In view of what has been stated by P.W.7 Dr. Rodrigues, according to me, there is no force in the submission of the learned counsel for the appellant that the version of P.W.9 Avisha that the accused had committed rape on her in a standing position with both of them facing each other was not possible. The injury sustained by the prosecutrix P.W.9 Avisha fully corroborates her version and there is nothing to discard what she has stated.

13. According to P.W.5 Arti and P.W.10 Anand, there was a slight trickle of blood from the vagina of P.W.9 Avisha, her clothes were also stained with blood, while P.W.4 Dr. Ghodekar states that, when he examined P.W.9 Avisha, there was no sign of bleeding. In the cross-examination, however, he has admitted that the history of profuse bleeding was given to him by P.W.5 Arti but, at the time of examination, there was no bleeding but, he could notice only marks of bleeding. These marks of bleeding were only inside the vagina. He has also admitted that he had seen hymenal tears. As against the evidence of P.W.4 Dr. Ghodekar, P.W.7 Dr. Rodrigues has stated that he had not noticed any hymenal tear. He has further admitted that bleeding would occur only if there was a tear. He has also admitted that there were no signs of healed tear. In this fact

situation, therefore, it was urged that the version of the prosecution witnesses is rendered doubtful. However, in the cross-examination of P.W.7 Dr. Rodrigues the following question was put to him:-

> "Q:- Dr. in case there is history of sexual assault on a minor girl by an adult male and history of bleeding, there must be widespread injuries to the vagina. What have you to say?
>
> Ans.:- In case there is complete penetration resulting in tears coupled with bleeding, there is possibility of widespread injuries in the vagina, however in the instant case with no injuries except bruise and if there are any marks of bleeding it is most likely that this bleeding is come from the rupture or tear of the frenum of the penis of the acc."

The statement of P.W.5 Arti that there was a slight trickle of blood from the vagina of P.W.9 Avisha does stand corroborated by the testimony of P.W.7 Dr. Rodrigues.

14. Merely because P.W.9 Avisha has stated that P.W.4 Dr. Ghodekar had not given anything in writing would not lead to an inference that the certificate at Exhibit 13 is a fabricated document. P.W.4 Dr. Ghodekar in the said certificate has merely stated that on examination of P.W.9 Avisha he had opined that it was a case of rape or forcible intercourse. His statement that the hymen was ruptured, which is contradicted by P.W.7 Dr. Rodrigues, is wholly insignificant. P.W.4

Dr. Ghodekar, admittedly, according to me, is a general practitioner, who has no expertise in examining patients in medico-legal cases. His opinion of rupture of the hymen, which is contradicted by P.W.7 Dr. Rodrigues, therefore, according to me, is completely insignificant.

15. The accused has examined two defence witnesses, namely, D.W.1 Tulshidas Sawant and D.W.2 Vishwas Maulingkar. D.W.1 Tulshidas states, on 9th December 1998, the appellant/accused had come to his house at 2.30 p.m. and had worked till 5.30 p.m.. Thereafter, the accused had gone home for having tea and had returned about 6.00 to 6.15 p.m. and, thereafter, they had worked till about 7.45 p.m.. At that time the brother of the accused by name Vishwas D.W.2 had come and had taken the appellant/accused away. In the cross-examination he has admitted that the appellant/accused is his friend and he is not on talking terms with P.W.10 Anand, father of P.W.9 Avisha. He has also admitted that he is not on talking terms with Arti P.W.5. He has also admitted that his house is at a distance of about 1 km. from the house of the accused. The learned trial Court has disbelieved this defence witness because of his admitted animosity with the father of P.W.9 Avisha. Moreover, according to me, this witness has admitted that the accused went back at 5.30 p.m. and returned at 6.00 or 6.15 p.m. and,

thereafter, worked till 7.45 p.m.. The statement of this witness that the appellant/accused worked till 5.30 p.m. can safely be accepted. His statement that the appellant/accused returned at 6.00 or 6.15 p.m. and worked till 7.45 p.m. till D.W.2 Vishwas came to take the appellant/accused home is a statement made by an obliging friend to help the appellant/accused. It is quite possible that the appellant/accused, after having committed the offence, returned to the house of D.W.1 Tulshidas from where he was called by D.W.2 Vishwas. The distance between the house of D.W.1 Tulshidas and the appellant/accused is only 1 km., giving just enough time for the appellant/accused to go to his house and come back again. According to me, therefore, the trial Court has rightly disbelieved the plea of alibi set up by the appellant/accused.

16. After considering the rival submissions made by the learned counsel for the parties and after perusing the evidence led on behalf of the prosecution and the accused, I am of the opinion that the prosecution has proved the offence beyond reasonable doubt. The submission of the learned counsel for the appellant/accused that the appellant/accused be awarded a sentence lesser than the minimum prescribed does not merit any consideration. No circumstances have been brought on record to interfere with the sentence awarded

by the learned trial Court. Therefore, in my opinion, the present appeal is devoid of any merit and the same deserves to be dismissed.

17. Accordingly, Criminal Appeal is dismissed. The conviction and sentence as passed against the appellant/accused is maintained. Since the appellant/accused is in jail, a copy of this Judgment be sent to the appellant/accused.

(P.V. HARDAS)
JUDGE.

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